

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CAPITOL DENTAL SUPPLY, INC.)	
)	Docket No. MSBCA 1351
Appeal of W.A. LOCKWOOD DENTAL CO., INC.)	
)	Docket No. MSBCA 1355
Under DGS RFQ No. P87-073)	

October 14, 1987

Responsiveness - The factual determination as to whether any product conforms to design specifications and thus is responsive to a solicitation primarily is a matter within the jurisdiction of the procuring activity.

Responsiveness - Where there is a difference of expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous.

Responsiveness - The challenged bid respecting a solicitation for dental equipment was not responsive as a result of an offer to provide a dental chair with an electromechanical base where the design specification called for a dental chair with a hydraulic base despite the "or equal" provision in the specification in the absence of any finding by the agency that the electromechanical base was equal to the hydraulic base. A post bid opening determination that the electromechanical base chair was acceptable in terms of the actual needs of the agency did not serve to cure the nonresponsive bid where prospective bidders were not advised that the State would accept either type chair prior to bid opening.

Responsiveness - A bidder has no right to rely on matter conveyed in prebid communication (in this case that the State would accept either type chair) where such communication is not authorized by the solicitation or otherwise by Maryland procurement law. Further, any material change to a request for bids or quotations resulting from prebid inquiry is required to be communicated to all other prospective bidders to ensure that all bidders are competing on an equal footing.

APPEARANCE FOR APPELLANT: (Capitol)	None
APPEARANCE FOR APPELLANT: (Lockwood)	None
APPEARANCES FOR RESPONDENT:	Allan B. Blumberg Michael P. Kenney Assistant Attorneys General Baltimore, Maryland
APPEARANCE FOR INTERESTED PARTY:	Herbert R. O'Connor, III, Esq. Cook, Howard, Downes & Tracy Towson, Maryland

OPINION BY CHAIRMAN HARRISON

These timely appeals which were consolidated for hearing arise out of solicitation of bids by the Department of General Services (DGS) on behalf of the Division of Correction of the Department of Public Safety and Correctional Services (DPS&CS) for dental equipment for the new State prison in Somerset County, Maryland.

Findings of Fact

1. The Purchasing Bureau of DGS solicited sealed bids, due July 15, 1987, under Request for Quotation (RFQ) No. P87-073, for dental equipment for two complete operatories at the Eastern Correctional Institution (ECI), in Somerset County.¹

2. The RFQ (Agency Report, Exh. 1) called for seventeen items of equipment for the dental operatories at ECI. It described certain features of each item and, for twelve of the seventeen items, mentioned a brand name "or equal." Of particular concern in this appeal is Bid Item 01 of the RFQ specifications which provides:

"Patient chair to include: All vinyl upholstery-adjustable articulating head rest-function switches on left and right sides-automatic return-slide back arm rests with slings-swivel seat-hydraulic base (115 volt-color to be determined after award. ADEC #1005 priority patient chair or equal."

3. On or about June 24, 1987, Mr. Lee Mayers, manager of Deeley Dental Supply Co. (Deeley), called Mr. Robert Kleinhen, the DGS buyer responsible for the procurement, to ask whether the State would accept a bid which included dental chairs with an electromechanical base (lift) instead of the "hydraulic base" (lift) feature required by Bid Item 01. No other prospective bidders inquired. Mr. Mayers testified that he was told by Mr. Kleinhen that the State would accept such a bid.² Mr. Kleinhen did not communicate his alleged approval of an electromechanical base instead of the hydraulic base to the procurement officer or to other prospective bidders prior to bid opening.

4. Bids were received by the July 15 bid opening date from Deeley, W.A. Lockwood Dental Co., Inc. (Lockwood), Capitol Dental Supply, Inc. (Capitol), and American Dental Supply Co. (American). Upon opening of bids it was noted that some of the bids were qualified as to the installation work required, and it became evident to DGS that installation of the equipment would be other than "normal," requiring bidders to incur costs beyond their bids for the equipment plus normal installation.³ Consequently, DGS advised all four bidders by telephone to submit an additional price, under the same RFQ, to cover the actual installation work required. The bidders responded with additional figures for installation ranging from a low of \$7,000 to a high of \$14,250.

5. On July 24, after public bid opening but before award, Deeley met with Warren J. Ingalls, Jr., Director of Health and Mental Health Services for the Division of Corrections, to discuss engineering drawings and plans for the proposed non-normal installation. At that time, Mr. Ingalls confirmed that Deeley was low bidder at that point⁴ and expressed satisfaction with Deeley's bid of the electromechanical base dental chairs.

6. On July 31, Mr. Ingalls sent a memorandum to Mr. Kleinhen finding that the equipment proposed in the Deeley bid "is acceptable in terms of his (sic) specifications." Agency Report, Exh. 3. Mr. Ingalls testified that he prepared the specifications including the specification for bid item 01 respecting the dental chairs. He gave no thought to any distinction between a hydraulic base or an electromechanical base and included the hydraulic base because that was a design feature of the ADEC chair whose manufacturer's literature he used to prepare the specification. He testified that had he used the manufacturer's literature for the chair proposed by Deeley (Dental EZ) he would have required the electromechanical base set forth in that manufacturer's literature. Neither Mr. Ingalls nor the procurement

¹The ECI is a 1500-bed medium-maximum security prison. Construction was started in April 1984 and substantially completed on August 12, 1987, at which time inmates began arriving. As of October 1, 1987, there were approximately 440 inmates at ECI; by January 1, 1988, approximately 1500 inmates are expected to be incarcerated there.

²Despite alleged approval of a chair with an electromechanical base, Deeley also submitted with its formal bid, an alternate bid that included a company brand chair with a hydraulic base. At bid opening DGS refused to accept the alternate bid in accordance with COMAR 21.05.02.21.

³The General Conditions in the RFQ stated that: "all items will be lot awarded" and "installation shall be 'normal' installation and include hookup to existing utilities and rough-in as provided by the user. If any other conditions exist which would preclude a 'normal' installation, itemize and price separate." Bidders were urged to visit and note the site and job conditions.

⁴At this time Deeley apparently had not yet submitted its price for the non-normal installation work required. (Tr. 47-49).

officer ever made a determination that an electromechanical base dental chair was technically equal or equivalent to a hydraulic base dental chair. Mr. Ingalls acknowledged in his July 31 memorandum and in his testimony before the Board that the two chairs were different. However, he concluded that use of the electromechanical base chair was acceptable, since the chairs met his agency's needs when he considered the bids after they were opened. Although somewhat conflicting, the testimony of representatives of Capitol, Lockwood, and Deeley reflect that there are substantive differences in the operating and maintenance characteristics of an electromechanical base chair and a hydraulic base chair. At the hearing, the procurement officer virtually conceded in response to questions posed by the Board that the Deeley bid was nonresponsive. (Tr. pp. 68-73).

7. The final bids, including the non-normal installation work, were as follows:

Deeley	\$67,955.00
Capitol	\$75,271.40
American	\$80,418.28
Lockwood	\$80,677.00

8. On August 24, Mr. Kleinhen sent a certified letter notifying Deeley that its bid was nonresponsive. Agency Report, Exh. 4. Between August 26, and September 1, Mr. Kleinhen, Mr. Paul Harris, the procurement officer herein and Chief of the DGS Purchasing Bureau, and Mr. Robin Zee, the Assistant Secretary of DGS for Operations, signed the RFQ results sheet which notes that Deeley's bid was nonresponsive because the Dental EZ brand dental chair offered in response to bid item 01 was electromechanical rather than hydraulic. Agency Report, Exh. 5. DGS recommended Capitol for the award.

9. Deeley protested the determination that its bid was nonresponsive by letter dated August 28 which was received in the Purchasing Bureau on August 31, 1987. Agency Report, Exh. 6.

10. DGS sustained Deeley's protest by final decision of the procurement officer dated September 8, 1987, reversing the earlier determination that the Deeley bid was nonresponsive. Agency Report, Exh. 7. The second lowest bidder, Capitol, appealed the procurement officer's decision to this Board on September 17 (Agency Report, Exh. 8), and the fourth lowest bidder, Lockwood, appealed the decision to this Board on September 28 (Agency Report, Exh. 9).

11. Concern for expeditious provision of dental health care to the ECI inmates led Mr. Ingalls to write the procurement officer on September 21 urging that the contract be awarded to Deeley immediately because he felt Deeley's proposal conformed fully to the DPS&CS's needs. Agency Report, Exh. 10. The next day, the Commissioner of Corrections expressed similar concerns to the Secretary of DGS urging contract award to Deeley despite Capitol's appeal, under COMAR 21.10.02.10, to avoid delay. Agency Report, Exh. 11.

12. On September 30, DGS requested an expedited hearing and decision by this Board. The Board granted the request based on the consent of all parties. The hearing of both appeals was conducted on October 6, 1987.

Decision

Respondent challenges the standing of Lockwood to bring its appeal. Appellant, Lockwood is the highest of four bidders. Lockwood would not be in line for the award if successful in disqualifying Deeley's bid. Capitol, the second lowest bidder, would benefit by such a decision. In order for Lockwood to benefit from a disqualification of Deeley, both Capitol and the third low bidder, American Dental Supply Co., would likewise have to be disqualified and their bids have not been challenged. Under such circumstances, we find that Lockwood is not an actual or prospective bidder, offeror or contractor that may be aggrieved by the actions of the procurement officer affecting its competitive position. COMAR 21.10.02.01A; COMAR 21.10.07.02A. See Eric K. Straub, Inc., MSBCA 1193, 1 MICPEL ¶83 (1984). Compare Baltimore Motor Coach Company, MSBCA 1216, 1 MICPEL ¶94 (1985). Lockwood is thus not an interested party and its appeal is therefore dismissed.

We turn now to the merits of Capitol's appeal. The crux of Capitol's appeal is that the procurement officer erred in sustaining Deeley's protest that the Deeley offer to provide dental chairs with the electromechanical base rather than the hydraulic base feature was responsive despite the language of the design specification calling for a hydraulic base. DGS

contends that the procurement officer correctly sustained the Deeley protest because of the "or equal" provision of the design specification and the determination by DPS&CS that the chair with an electromechanical base offered by Deeley was "considered acceptable as an equal" to the hydraulic base chair required by the specification.

We have noted that:

"The factual determination as to whether any product conforms to design specifications and thus is responsive to a solicitation primarily is a matter within the jurisdiction of the procuring activity. Compare 49 Comp. Gen. 196, 198 (1969). We will not substitute our judgment for that of the procuring agency in the absence of a clear showing that it acted unreasonably or otherwise abused its discretion in determining that a product did [or did] not comply with specifications. *Id.* Where there is a difference of expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous. *Id.* Compare Solon Automated Services, Inc., MSBCA 1046 (January 20, 1982)."

Adden Furniture, Inc., MSBCA 1219, 1 MICPEL ¶93 at p. 4 (1985). See Packard Instrument Company, MSBCA 1272, 1 MICPEL ¶125 (1986). Here, however, neither the procurement agency, DGS, nor the using agency, DPS&CS, made a determination that the electromechanical base feature of the chair proposed by Deeley was technically equivalent to the hydraulic base feature of the chair called for in the design specification. Vendor representatives agree that there are substantive differences in operating and maintenance characteristics of hydraulic and electromechanical base dental chairs. What the evidence of record reveals occurred was that the requirement of the specification to provide hydraulic base chairs was relaxed or ignored after bid opening. Deeley's bid proposing to use a chair with an electromechanical base was simply not responsive to a specific salient characteristic of the design specification as written.

Maryland procurement law requires that bidders compete on an equal footing, and that one bidder not be accorded a competitive advantage to the prejudice of the other bidders by the action of the State. See J&L Industries, Inc., MSBCA 1230, 1 MICPEL ¶98 at pp. 5-6 (1985). Compare The Fechheimer Bros. Co. and Harrington Industries, MSBCA 1181 & 1182, 1 MICPEL ¶74 (1984). Here the evidence reflects that Deeley was permitted to offer a dental chair that did not meet the RFQ's design specification which required a hydraulic base. The procurement officer's subsequent determination that the Dental EZ electromechanical base chair offered by Deeley was equal to the chair specified by the specifications based on a determination by DPS&CS that the electromechanical chair was acceptable for use in the ECI was therefore erroneous.

DGS also argues that Capitol, like Deeley, could have contacted DGS prior to bid opening and determined whether DGS would accept anything other than a dental chair with a hydraulic base. This argument misses the mark. The specification was clear that it required a dental chair with a hydraulic base. The prebid communication between Mr. Kleinhen (who was not the procurement officer) and Deeley was not in accordance with Maryland procurement law since such communication was not authorized by the RFQ or otherwise and Deeley therefore had no right to rely on any representation made therein. See J&L Industries, Inc., *supra*; Concrete General, Inc., MSBCA 1062, 1 MICPEL ¶87 at p. 14 (1984). Compare Eagle International, Inc., MSBCA 1121, 1 MICPEL ¶40 (1983), *recon. den.*, 1 MICPEL ¶43, *rev'd*, Case No. Law 1105753 (Cir. Ct. Anne Arundel Co., Mar. 2, 1983).

The DGS procurement officer and agency head, not Mr. Kleinhen, are ultimately responsible under COMAR for the content, clarity, and completeness of specifications. COMAR 21.04.01.04. Further, any material change to a request for bids or quotations resulting from prebid inquiry is required to be communicated to all other prospective bidders which did not occur in this case. See COMAR 21.05.02.08. In any event, we reject DGS's contention that Capitol is barred from seeking relief because it did not engage in prebid discussions with Mr. Kleinhen or anyone else concerning specification Bid item 01 which was clear on its face.

For the foregoing reasons, we sustain the appeal of Capitol.